(18)

No. 84-4

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL., PETITIONERS

v.

HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether, under this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), respondent's claim that its property was taken without just compensation in violation of the Fifth and Fourteenth Amendments should have been dismissed because respondent did not pursue procedures under state law to obtain compensation or show that those procedures are inadequate.

2. Whether respondent's claim of an unconstitutional taking, based on the disapproval by petitioner Planning Commission of a particular preliminary plat for development of a residential subdivision, was ripe for adjudication, despite respondent's failure to revise its proposal in light of the Commission's concerns, to request a variance, or to seek judicial review of the disapproval in state court.

3. Whether, if the taking claim was ripe for adjudication, the Commission's disapproval of the particular preliminary plat constituted a taking, even though the zoning ordinance, subdivision regulations, and other factors relied upon by the Commission advanced legitimate state interests and did not foreclose substantial development of the tract.

4. Whether, in light of the district court's holding that the Commission's actions were not authorized by state law, the Commission's disapproval of the preliminary plat gives rise to a claim for just compensation.

5. Whether, if the Commission's application of the current zoning ordinance and subdivision regulations to respondent's land on a permanent basis would have constituted a taking, the temporary application of those provisions until the district court enjoined the Commission from relying upon them in considering future proposals by respondent also must be regarded as a taking that requires the payment of compensation.

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INTEREST OF THE UNITED STATES

This case raises important questions concerning the circumstances in which the government may be required to pay compensation for the enforcement of a regulatory measure that is held to constitute a "taking" of property. It therefore may have an impact on the administration of federal regulatory programs affecting land use. See note 12, *infra*.

STATEMENT

1. a. Under the laws of Tennessee, the legislative body of a county is authorized to adopt a zoning ordinance to regulate the location and dimension of buildings, the density and distribution of population, and the uses of buildings and land for "trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation or other purposes." Tenn. Code Ann.

§ 13-7-101 (1980). Such an ordinance must be designed "for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of the state and of its counties" (*id.* § 13-7-103). The board of zoning appeals may grant a variance where strict application of the ordinance to a parcel of land having unusual topographical or other conditions would "result in peculiar and exceptional practical difficulties" or would cause "exceptional and undue hardship upon the owner," if such relief may be granted "without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinances." *Id.* § 13-7-109.

b. Tennessee law also provides for the establishment of regional planning commissions, which are charged with formulating comprehensive development plans. Tenn. Code Ann. §§ 13-1-106, 13-3-401 *et seq.* (1980). Petitioner Williamson County Regional Planning Commission is one such commission. No plat of a subdivision of land within a county may be recorded until it has been approved by the responsible planning commission. *Id.* § 13-3-402. In exercising that responsibility, the planning commission must provide for the "harmonious development of the region and its environs," the "coordination of roads within the subdivided plat," "adequate open spaces," "adequate transportation, water, drainage and sanitary facilities," "avoidance of population congestion," and avoidance of such "scattered or premature subdivision of land as would involve danger or injury to health, safety or prosperity" (*id.* § 13-3-403). The commission also may specify the manner in which roads must be graded or improved and utility and other facilities must be installed "as a condition precedent to the approval of the plat." *Ibid.*

In 1973, when the residential subdivision at issue in this case was first proposed, the Williamson County Regional Planning Commission followed a two-step procedure for review and approval of a subdivision plat (C.A. App. 870). The initial step involved the preparation and submission of a "preliminary sketch plat" showing, inter

alia, the current zoning classification, the contour of the land, existing and proposed roads, and property lines, buildings, utility lines, and open space (*id.* at 871). If the preliminary plat was approved, the developer then could proceed to the preparation of the more formal and detailed final plat (*id.* at 870, 872). The regulations expressly provided, however, that the approval of a preliminary plat "will not constitute acceptance of the final plat" and that approval of a preliminary plat would lapse unless a final plat based on it was submitted within one year or the Commission granted an extension (*id.* at 872).

In order to be approved, the plat was required to conform to the substantive terms of the zoning ordinance and the subdivision regulations governing such features as the location, width and grade of streets; arrangement and minimum size of lots; building setbacks; and suitability of the land for development (C.A. App. 876-893, 897). However, the Commission was authorized to grant a variance where "unnecessary hardship" otherwise would result or where, "because of topographical or other conditions peculiar to the site," a departure could be made without destroying the intent of the regulations (*id.* at 887).

2. a. In 1973, respondent's predecessor in interest—the developer of the residential subdivision known as Temple Hills Country Club Estates—submitted to the Williamson County Regional Planning Commission a preliminary plat for "cluster" residential development of its tract. Then, as now, the zoning ordinance for the County permitted such "cluster" development, under which houses could be built on relatively small lots if other land in the tract was kept as open space (Pet. App. 3a-4a; C.A. App. 857-860). However, the density of the overall development could be no greater than that permitted under the County's zoning ordinance (in this case, one unit per acre), computed on the basis of the total acreage in the tract less one-half of all land lying on a slope having a grade in excess of 25%. In addition, clustered units could not be built on

any particular parcel that was on a steep slope or was otherwise unbuildable (C.A. App. 858).

The Commission approved the developer's preliminary plat for Temple Hills in May 1973 (J.A. 246-247). The plat showed a total project area of 676 acres, of which 416 acres eventually would be developed for residential use and 260 acres would be dedicated as open space, primarily in the form of a 245-acre golf course. Although the plat bore a notation stating that the number of "allowable dwelling units for total development" was 736,[1] the plat actually showed lot lines for only 469 units on 287 of the 416 acres that were designated for residential development. The remaining 129 acres, on which no lot lines were drawn, were labeled "not to be developed until approved by the Planning Commission." In June 1974 and June 1975, the preliminary plat for Temple Hills was revised slightly and reapproved (J.A. 270, 272, 362). The owners sought and obtained approval of a final plat for each section of the overall tract only when they were ready to proceed with that section. Final plats apparently were approved for several such sections in 1973, 1974 and 1975 (J.A. 272, 277-278, 295-296). Because of various economic problems, however, development of Temple Hills faltered during 1976 and 1977, and the preliminary plat was not reapproved during that period (J.A. 274-275, 295-296).

In October 1977, Williamson County amended its zoning ordinance. The 1977 ordinance retained the prior density standard of one unit per acre, the exclusion of one-half of the acreage having a grade of more than 25%, and the prohibition against building units on any steeply sloped parcel (J.A. 417). It also added a new requirement that in calculating the number of allowable units, 10% of the total acreage must be deducted as attributable to roads and utilities (*ibid.*). In 1978, the

[1] The total number of allowable units exceeded the total number of acres because the term "acre" was defined as 40,000 square feet, although a standard acre contains 43,500 square feet (J.A. 362).

developer of Temple Hills obtained approval of a preliminary plat that was essentially similar to the one approved in 1973 (J.A. 274), and that plat was again approved for one year in August 1979 (*id.* at 278-281, 296, 362).

b. By 1980, final plats covering 212 lots had been approved by the Commission and the 245-acre golf course had been set aside as open space (J.A. 296, 362). In October of that year, the developer again submitted a preliminary sketch plat for Temple Hills that provided for a total of 736 units, including the 212 lots previously given final approval. This time the Commission disapproved the submission (J.A. 297-298). Although the Commission had adopted amended subdivision regulations in June 1980,[2] the disapproval was not based on those new regulations. Rather, the minutes of the Commission's meeting state that the "plan as presented" was disapproved on three grounds: (1) there was no deduction for 10% of the acreage attributable to roads or one-half of the land having a slope of more than 25%; (2) approximately 18.5 acres that had been taken by eminent domain for a parkway were not excluded in calculating the number of units; and (3) individual lots were located on slopes of more than the 25% (*ibid.*). The Commission's staff had estimated that these restrictions would reduce the number of allowable units on the entire tract from 736 to 548 (J.A. 304), thereby permitting 336 additional units.[3]

[2] The new regulations increased the minimum lot size from 9,000 square feet to ½ acre and minimum lot width from 75 to 125 feet (C.A. App. 884, 940). The 1980 regulations also provided that the Commission could issue variances where "strict adherence to [the] regulations would cause unnecessary hardship" (C.A. App. 932-933).

[3] The Commission's staff had recommended disapproval on several additional grounds, including (1) failure to conform to 1980 subdivision regulations pertaining to the length of cul-de-sacs, road grades, minimum lot size, and road frontage; (2) inadequacy of the main access road; and (3) failure to provide adequate fire protection service and recreational facilities (J.A. 304-305). How-

c. In November 1980, respondent acquired, through foreclosure, the 258 acres of the Temple Hills tract that had not yet been developed and sold (Pet. App. 5a; Tr. 791-792).[4] In June 1981, respondent submitted a preliminary plat that was similar to the developer's proposal

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ever, a committee that had been appointed by the Commission to assist the developer in designing a suitable plat for Temple Hills had recommended waiver of the cul-de-sac, road grade, minimum lot, and road frontage requirements (*id.* at 297, 305-306).

[4] Respondent's association with the Temple Hills project has a complicated history. In 1973, the joint venture that was formed to develop Temple Hills obtained an $8 million loan that was arranged by the Hamilton Mortgage Corp., which, along with respondent, was a subsidiary of Hamilton Bankshares, a holding company. Respondent participated in the loan in the amount of $900,000 (Tr. 774-779).

In February 1976, Hamilton Bankshares, its mortgage subsidiary, and another subsidiary bank that had participated in the loan to the Temple Hills developers all became insolvent, but respondent did not (Tr. 777, 780, 782). In July 1976, respondent was acquired by Ancorp Bankshares, another holding company (Tr. 781). Ancorp identified respondent's participation in the Temple Hills loan as one of several "problem loans" (Tr. 774). Nevertheless, through a complicated series of transactions involving the trustee in bankruptcy of the mortgage subsidiary and the Federal Deposit Insurance Corporation (which was liquidating the other banking subsidiary), Ancorp caused respondent to acquire a 100% interest in the Temple Hills project in return for giving up its interest in a development in Hilton Head, on which the same three parties had foreclosed following default on a loan (Tr. 782-784). To acquire that interest, respondent paid the FDIC $1.8 million and gave up its $900,000 interest in the Hilton Head project, leaving respondent with a total stake in the Temple Hills project of $3.6 million (Tr. 784-785). Respondent in turn sold the Temple Hills property to Jim Patterson, one of the original developers, for $3.6 million, receiving $1.2 million in cash and a note for the balance of $2.4 million (Tr. 785-787). Patterson then sold the golf course to satisfy other indebtedness on the Temple Hills project (Tr. 787). Although 60 houses were built on the tract in 1978, the project slowed down after that date when the economy worsened and Patterson experienced financial difficulties (Tr. 790). Respondent foreclosed on the mortgage and purchased the 258 acres at a sheriff's sale on November 26, 1980, for $1.75 million (Tr. 796). The balanced owed by Patterson (including accrued interest) at the time of the foreclosure was $2.87 million (Tr. 793).

that had been rejected by the Commission in October 1980. The Commission again declined to approve the plat, relying in part on the same density and slope restrictions it had cited on the prior occasion.[5] In addition, the Commission explained that two cul-de-sacs were 3,000 and 5,000 feet in length, well in excess of the 800-foot maximum under the subdivision regulations (C.A. App. 945); road grades exceeded the maximum allowed under county road regulations; the main access road for the development (Temple Road) had deteriorated and could not handle the traffic that would be generated; there was confusion over responsibility for installing underground electrical cables; inadequate provisions were made for fire protection, recreational facilities, and open space for multi-family housing; and the plat failed to comply with minimum lot size and frontage requirements in the 1980 subdivision regulations (*ibid.*).

3. Respondent then filed this suit in the United States District Court for the Middle District of Tennessee seeking damages and injunctive relief against the Commission under 42 U.S.C. 1983, based on an alleged taking of its property in violation of the Fourteenth Amendment, and under the state common law of estoppel (Pet. App. 5a).[6]

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[5] Representatives of respondent had appeared at the November 11, 1980 meeting of the Williamson County Board of Zoning Appeals, seeking a ruling that respondent was entitled to develop Temple Hills under the zoning ordinance in effect in 1973 rather than that adopted in 1977 (J.A. 310-330). The Board ruled in respondent's favor, apparently on the ground that the prior approval of its preliminary plats rendered its entire proposal, even though only partially developed, a nonconforming use (*id.* at 328). However, the Planning Commission declined to follow that ruling on the ground that the Board did not have jurisdiction to resolve such a general question of law (J.A. 361; Tr. 187-188, 812)—a position that subsequently was endorsed by an opinion of the Attorney General of Tennessee (No. 80-581 (Dec. 1, 1980)).

[6] Respondent's claims of a deprivation of equal protection and procedural and substantive due process were rejected either by the court or the jury (Pet. App. 4a-5a) and are not at issue here.

Respondent's coordinator for the Temple Hills project testified at trial that, in his view, only 67 lots could be developed on the remaining 258 acres in the Temple Hills tract under the zoning ordinance and planning regulations in effect in 1980 and under the conditions set forth in the Commission's June 1981 letter disapproving the preliminary plat (J.A. 101-104; Tr. 238-243). However, the county engineer testified that respondent would be permitted to develop nearly 300 additional lots (Tr. 1467-1468). The jury found that respondent had been deprived of the economically viable use of its land and that the Commission therefore had unconstitutionally taken respondent's property (Tr. 2015-2016, 2022-2027). The jury also found that the Commission was estopped under state law from applying the present zoning regulations, rather than the 1973 regulations, to the Temple Hills development (Tr. 2016-2018, 2022, 2027). In light of the jury's estoppel verdict, the district court enjoined further application of post-1973 regulations to Temple Hills (Pet. App. 29a-30a).

The jury then awarded $350,000 in damages for a "taking" of the property from the time the Commission applied the 1980 regulations to respondent's land until the date of the jury's estoppel verdict (Pet. App. 5a-6a; Tr. 2040-2043, 2055, 2058), but the district court granted the Commission's motion for judgment notwithstanding the verdict (Pet. App. 23a). The court reasoned that in light of the jury's estoppel verdict, there had been only a temporary interference with respondent's property. The court concluded that this effect did not constitute a taking for which compensation was required, especially since "[a]ny damages which [respondent] suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law" (Pet. App. 26a).

In March 1983, while cross-appeals were pending, the Commission approved a modified preliminary plat submitted by respondents (see Pet. 8). We understand that

this approval was part of a settlement agreement between the parties on the estoppel issue, under which the Commission would permit respondent to develop 476 additional units and grant variances from the 1973 regulations for certain cul-de-sacs and road grades, and respondent would resurface Temple Road, adhere to the 1980 standards in building additional roads, and avoid locating lots on unsuitable soils. See Planning Comm'n Minutes, Exh. 1 (Sept. 8, 1983).

4. Respondent nonetheless pursued its appeal, and a divided court of appeals reinstated the award of damages (Pet. App. 1a-22a). The majority found sufficient evidence to support the jury's verdict that the 258 acres "had no remaining economically viable use" in light of the Commission's actions (Pet. App. 9a-10a). The majority also found sufficient evidence to support the jury's estoppel verdict and thus to support the conclusion that the Commission had destroyed respondent's reasonable investment-backed expectations (Pet. App. 10a-12a). On this basis, the majority held that respondent was entitled to compensation for a "temporary taking" of its property between October 1980 and the date of trial 18 months later (Pet. App. 12a-15a).

Judge Wellford dissented (Pet. App. 16a-22a). He concluded that the evidence did not establish that petitioner had been denied economically viable use of its land, especially because there was no evidence that respondent had requested a variance and because it was "virtually conceded" that, even under current standards, a total of 548 units would be approved for the Temple Hills tract (*id.* at 16a-17a). He further concluded, however, that, the temporary interference with respondent's expectations did not constitute a taking, particularly since the Commission had determined that respondent was not even in compliance with some restrictions that were contained in the 1973 regulations (*id.* at 17a-20a).

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a fundamental defect in the proceedings in this case that seems not to have been addressed by the courts below. The court of appeals reinstated an award of damages for an unlawful "taking" of respondent's property. Yet the Constitution does not prohibit the government from taking private property; to the contrary, the power to do so is an essential attribute of sovereignty. The Fifth Amendment, which is applicable to the States through the Fourteenth Amendment,[7] provides only that private property shall not be taken for public use "without just compensation." Compare *Parratt* v. *Taylor*, 451 U.S. 527, 537 (1981). Nor does the Constitution require that compensation precede the taking; it is sufficient if there is a procedure pursuant to which the person deprived of his property may thereafter recover compensation. *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932); *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 28. Only where a State has not provided such a post-taking procedure (or where that procedure is inadequate) has the State violated the constitutional prohibition against the taking of property without just compensation, and only then may a federal court entertain a suit to remedy the alleged constitutional violation. Compare *Parratt* v. *Taylor*, *supra*; *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), slip op. 12-18; *id.* at 3-5 (O'Connor, J., concurring); *id.* at 2 n.4 (Stevens, J., concurring and dissenting). See *Dohany* v. *Rogers*, 281 U.S. 362, 366-368 (1930). To ignore this principle "would make of the Fourteenth Amendment a font of [land use law and remedies] to be superimposed upon whatever systems may already be administered by the States." *Parratt* v. *Taylor*, 451 U.S. at 544, quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976).

In this case, the Tennessee Constitution provides that no property shall be taken or applied to public use "without just compensation being made therefor." Art. I, § 21.

[7] *Chicago, B. & Q.R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897).

To implement this guarantee, state law permits a landowner to bring an action to recover compensation for a taking that already has occurred (Tenn. Code Ann. § 29-16-123 (1980)), and the Tennesee Court of Appeals has stated that "[i]t is possible to recover in inverse condemnation for unreasonable restriction of the use of property by enactment of a zoning law." *Davis* v. *Metropolitan Gov't, of Nashville*, 620 S.W.2d 532, 534 (1981); cf. *Land Associates* v. *Metropolitan Airport Authority*, 547 F. Supp. 1128, 1131 (M.D. Tenn. 1982), aff'd, 712 F.2d 248 (6th Cir. 1983). Because respondent apparently has never sought compensation under this procedure or shown that it does not afford an adequate remedy (compare *Agins* v. *City of Tiburon*, 447 U.S. 255, 259 (1980)), the courts below erred in entertaining respondent's suit under 42 U.S.C. 1983 seeking relief for an allegedly unconstitutional taking. See *Suess Builders Co.* v. *City of Beaverton*, 656 P.2d 306, 313-314 (Or. 1982).

A. Quite aside from the defect just discussed, the court of appeals in this case countenanced a wholly unwarranted and peremptory intrusion by the federal courts into the orderly administration of the zoning and land use laws of the States and their local governments. The district court, affirmed by the court of appeals, entertained respondent's suit contending that the Planning Commission's disapproval of a particular preliminary plat had resulted in a taking of its property, even though respondent had failed to develop an alternative proposal in an effort to accommodate the Commission's concerns, failed to pursue applicable variance procedures that are designed to alleviate hardships, and failed to seek judicial review in state court. There accordingly was no indication that the State had finally and permanently barred all substantial development on respondent's tract, such that its actions could be said to have ripened into a concrete "taking."

B. The court of appeals' conclusion that a "taking" had occurred in this case by virtue of the Commission's application of reasonable zoning regulations and related

restrictions that plainly permitted substantial residential development on the remaining portions of the Temple Hills tract is flatly inconsistent with this Court's repeated recognition of the central role of zoning and other land use restrictions in promoting public health and safety and the general welfare of the community. There was no physical invasion of respondent's premises, no substantial change in governing regulations, no uniquely harsh impact on respondent, and no interference with reasonable investment-backed expectations on respondent's part that it would be permitted to develop additional lots without regard to the regulations in effect when it sought final approval.

C. Because the court of appeals was clearly incorrect that the regulations and other restrictions respondent challenged would have resulted in a taking if they had been made permanently applicable to respondent's land, it is clear that no taking occurred during the limited period that elapsed until the district court held that the Commission was barred by state law from applying the post-1973 regulations to Temple Hills. In any event, because the district court held that the Commission's actions were not authorized by state law, those actions cannot give rise to a claim for just compensation.

ARGUMENT

A. THE COMMISSION'S ACTIONS DID NOT RIPEN INTO A FINAL DISAPPROVAL BY THE STATE THAT COULD CONSTITUTE A "TAKING" OF PRIVATE PROPERTY

After the Planning Commission declined to approve the preliminary plat respondent submitted in June 1981, respondent did not revise its submission in an effort to meet the Commission's concerns, did not request a variance, and did not seek judicial review in state court. Respondent instead immediately brought this action in federal district court alleging that the Commission's action resulted in a taking of its property in violation of the Federal Constitution. The constitutional claim was not ripe, however, because as a result of respondent's failure

to pursue available procedures under state law, there had been no final action by the State barring the development of respondent's land that in turn could properly be regarded as a "taking" of respondent's property.

1. In *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980), the Court held that the mere enactment of the zoning ordinances under review did not constitute a taking of the appellants' property, because they might have been permitted under those ordinances to build as many as five houses on their five-acre parcel. The Court further held that "[b]ecause the appellants [had] not submitted a plan for development of their property as the ordinances permit[ted], there [was] as yet no concrete controversy regarding the application of the specific zoning provisions." 447 U.S. at 260. As petitioner contends (Pet. 13-14), this case is in essentially the same posture.

To be sure, respondent, unlike the appellants in *Agins*, did submit a preliminary plat to the Commission in June 1981, and the Commission declined to approve that plat. But the Commission did not suggest that it intended to bar all or substantially all further development on the remaining 258 acres of the Temple Hills tract, such that it would be futile for respondent to submit a revised proposal. To the contrary, the County Engineer testified at trial that the zoning ordinance and subdivision regulations would have permitted almost 300 additional units to be built (Tr. 1467-1468). In these circumstances, it was incumbent upon respondent, before suing to recover for an allegedly unlawful taking, to revise its proposal and to cooperate in good faith with the Commission in an effort to reach a mutually satisfactory accommodation. In that process, the Commission would have had an opportunity to correct its own errors, to apply its experience and expertise, to reach a deliberate and conclusive judgment regarding the precise extent to which it would permit development on the tract, and to develop a more complete record to inform the judgment of a court that might review its actions under state law or make the essentially "ad hoc, factual inquiries" required in consid-

ering a taking claim. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975). Only then would the Commission's decision applying the governing regulations to the particular parcel have had sufficient formality, concreteness and finality to be regarded as an actual "taking" of property by the State, as distinguished from an interlocutory ruling or informal action in the administration of a regulatory program that could not properly give rise to a claim for monetary relief. Cf. *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense* (*Varig Airlines*), No. 82-1349 (June 19, 1984), slip op. 10-12.

2. Respondent not only failed to revise its submission to meet the objections of the Commission within the limitations imposed by the zoning ordinance and subdivision regulations in effect in 1981; it also failed to seek a variance from the application of those limitations. The Board of Zoning Appeals was authorized to grant a variance where unusual topographical conditions created "exceptional practical difficulties" or "exceptional and undue hardship," if it could do so "without substantially impairing the public good" (Tenn. Code Ann. § 13-7-109 (1980)). The Commission likewise was authorized to grant a variance from its regulations in cases involving undue hardship or special topographical features (C.A. App. 932-933). It therefore was possible that respondent could have obtained a relaxation of the provisions governing density, sloping, minimum lot size, frontage, road grades, and cul-de-sac lengths to the extent necessary to permit respondent to develop what it regarded as a financially feasible package.[8]

[8] Such a request might well have been fruitful, at least in some respects. A committee appointed by the Commission to assist the developer to prepare a suitable proposal for Temple Hills in October 1980 had recommended waiver of the cul-de-sac, road grade, minimum lot, and road frontage requirements of the 1980 subdivision regulations. See note 3, *supra*.

The hardship and topographical exceptions permitted under the variance procedures are responsive to the very concerns respondent has raised in connection with its taking claim in this case, and, by the same token, they afford the Commission and the County an opportunity to avoid such a taking and any monetary liability it might impose. Under essentially identical circumstances, the Court in *Virginia Surface Mining* held that the landowners' taking challenge to particular provisions of the Surface Mining Act was not ripe because they might obtain administrative relief by seeking a variance. See 452 U.S. at 297.[9] The decision in *Virginia Surface Mining*, like that in *Agins*, therefore required the district court to dismiss respondent's taking claim on ripeness grounds. See also *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 24, 29, 30-31; *Dames & Moore* v. *Regan*, 453 U.S. 654, 689 (1981); Pet. App. 16a-17a (Wellford, J., dissenting).

Of course, in March 1983, after the district court entered its judgment, the Commission did approve a preliminary plat for 476 additional units as part of a settlement of respondent's estoppel claim.[10] Because respondent's taking claim was not ripe prior to that date and because it then was rendered moot by the Commission's approval of a preliminary plat permitting substantial

[9] See Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. Law. 447, 473 (1983) (footnotes and emphasis omitted):

> The time of "taking" generally is never to be determined from the date of publication of a plan or enactment of a regulation. As of that time and until the landowner applies for a variance, a building permit, or other similar license from the appropriate board and has been denied, there has been no harm done. Harm cannot be determined until the regulation is applied to the individual.

See also *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1201 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

[10] In doing so, the Commission granted respondent variances for certain cul-de-sac and road grades. See pages 8-9, *supra*.

development, there is not now and never has been a justiciable "taking" issue in this case.

3. The viability of respondent's taking claim in federal court is further undermined by respondent's failure to seek judicial review in state court of the Commission's disapproval of its preliminary plat in June 1981. If, as appears, there was an available state procedure for obtaining such review,[11] then the Commission's decision did not under state law constitute a final rejection by the State of respondent's claim of a right to develop its property in conformity with its submission. Under the principles of *Agins* and *Virginia Surface Mining*, just discussed, there was no ripe taking claim for this additional reason as well.

Pursuit of available state judicial remedies in these circumstances would have afforded the state courts an opportunity to construe and apply state law and regulations in light of respondent's constitutional contentions, perhaps "thereby obviating any need to address the constitutional questions" (*Virginia Surface Mining*, 452 U.S. at 297 (footnote omitted)), or to grant relief on constitutional grounds. See *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668, 677 (1976). Moreover, if the state court had held the Commission's action invalid on state law grounds, respondent's taking claim would have been moot, since agency action that is unauthorized by law cannot give rise to a claim for just compensation. See *Ruckelshaus* v. *Monsanto Co.*, slip op. 27; *Dames & Moore* v. *Regan*, 453 U.S. at 688; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974); *Yearsley* v. *Ross Construction Co.*, 309 U.S. 18, 21 (1940); *Hooe* v. *United States*, 218 U.S. 322, 336 (1910). Cf. *Virginia Surface Mining*, 452 U.S. at 296 n.37. And in fact the

[11] Tennessee courts may review arbitrary zoning action by a governmental body by means of the common law writ of certiorari. See Tenn. Code Ann. § 27-9-101 (1980); *Brooks* v. *City of Memphis*, 192 Tenn. 371, 241 S.W.2d 432 (1951); *Land Associates* v. *Metropolitan Airport Authority*, 547 F. Supp. 1128, 1133 (M.D. Tenn. 1982), aff'd, 712 F.2d 248 (6th Cir. 1983).

district court in this case held that the Commission's actions were not authorized by state law, thereby removing any basis for a claim of just compensation. See page 8, *supra*, and pages 27-28, *infra*.[12]

[12] The principles we have discussed in the text are not simply ones of federalism. They go to the question whether there even has been a taking of private property within the meaning of the Fifth Amendment. Accordingly, as the Court's decision in *Virginia Surface Mining* makes clear, those principles are equally applicable to claims that a federal statute or regulation would result in a taking if applied to particular property. Many federal programs provide for the granting of licenses, permits, or variances. Often there are established procedures for administrative review of a denial of an application, and judicial review typically is available either under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or under a special statutory review procedure. The orderly administration of these programs would be undermined if a person subject to regulation under them could ignore established procedures for direct review of interlocutory or final agency action and instead bring a taking claim in federal court, whether in the form of an action for injunctive or declaratory relief or a suit under the Tucker Act seeking just compensation.

For example, the prohibition in Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1272(e), against any surface coal mining in certain areas is made subject to "valid existing rights." See *Virginia Surface Mining*, 452 U.S. at 296 & n.37. The Department of the Interior has construed that exception as embodying a congressional intent that the prohibition in Section 522(e) does not apply where it would result in a taking that would require the payment of compensation under the Fifth Amendment. A person seeking to mine in such an area must seek an administrative determination by the Interior Department as to whether he has a "valid existing right," and that administrative decision is subject to judicial review. See 48 Fed. Reg. 41313-41314 (1983). Thus, it is particularly clear under this statutory scheme that the denial of a mining permit on such land cannot give rise to a claim for just compensation because, under the Secretary's construction, Congress has not authorized the denial of a permit that would constitute a taking. The person claiming a right to mine on the land therefore must pursue his administrative remedies and seek judicial review of an adverse administrative determination; he has no taking claim as such.

This same rationale would apply in the administration of any statute in which Congress did not authorize the agency to engage in action that would constitute a taking and thereby give rise to a

B. THE PLANNING COMMISSION'S ACTIONS IN 1980, EVEN IF THEY HAD NOT BEEN MODIFIED BY THE DISTRICT COURT'S ESTOPPEL RULING, DID NOT EFFECT A "TAKING" OF RESPONDENT'S PROPERTY

If, contrary to our submission in Point A, the "taking" issue in this case is ripe for resolution, the court of appeals' holding that the Planning Commission's actions accomplished a taking of respondent's property for which the Constitution requires the payment of compensation should be reversed. That holding is flatly inconsistent with this Court's decisions.

The Court need not be detained here by its threshold admonition in other cases that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests" (*Agins* v. *City of Tiburon*, 447 U.S. at 260). As the court of appeals conceded (Pet. App. 6a), the Williamson County zoning ordinance and subdivision regulations in effect in 1980 clearly advanced legitimate state interests. Here, as in *Agins*, the density limitations further the important interest of preserving open space and thereby "protect[ing] the residents * * * from the ill effects of urbanization" (447 U.S. at 261 (footnote omitted)). Similarly, the prohibition against building on steeply sloped lands respects the integrity of the natural

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claim for just compensation. This is but another aspect of the question, discussed in *Ruckelshaus* v. *Monsanto Co.*, slip op. 27, of whether Congress intended for there to be a Tucker Act remedy in the particular case. Where Congress has not authorized a Tucker Act remedy in connection with a regulatory program administered by a federal agency under broad discretionary standards, it may often be because Congress did not want the public to subsidize the adjustment of benefits and burdens of private persons and therefore did not authorize the agency to apply the statute in circumstances that would constitute a taking and give rise to a claim for monetary compensation. In those circumstances, the court may enjoin the operation of the statute or agency action to the extent it constitutes a taking, not only because a Tucker Act remedy is not available, but also because Congress did not intend for the statutory restrictions to be applied in that manner.

terrain as an aesthetic matter, protects public health and safety, and helps to retain soil, vegetation and water on the slope. Cf. *Virginia Surface Mining*, 452 U.S. at 283-284 & n.22. See *Goldblatt* v. *Hempstead*, 369 U.S. 590, 593 (1962). The other objections in the Planning Commission's June 1981 letter (see pages 6-7, *supra*) also clearly served legitimate state interests.

The question, then, is whether the County's pursuit of these concededly valid objectives by enforcement of its zoning ordinance and subdivision regulations nevertheless constituted a taking. "[T]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action' must be deemed a compen[sable] taking." *Kaiser Aetna* v. *United States*, 444 U.S. 175 (1979), quoting *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). The Court instead has considered a number of factors that fall into three general categories: (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation," and (3) the extent to which there has been an interference with "distinct investment-backed expectations" (*Penn Central*, 438 U.S. at 124).

1. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government" (*Penn Central*, 438 U.S. at 124, citing *United States* v. *Causby*, 328 U.S. 256 (1946)) "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good" (438 U.S. at 124). See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 437, 440-441 (1982). The zoning ordinance and subdivision regulations at issue here obviously fall in the latter category.

In addition, the Court has attached significance in the area of land-use regulation to whether the statutory program imposes restrictions on a number of parcels and thereby enables the owner of any particular parcel to

share in the benefits as well as the burdens of the exercise of governmental power. *Agins* v. *City of Tiburon*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 131, 134-135; *id.* at 139-140 (Rehnquist, J., dissenting). In this case, as in *Agins* (447 U.S. at 262), there is no indication that respondent's tract is the only property in the County affected by the regulations. Compare *Virginia Surface Mining*, 452 U.S. at 281-282. Moreover, while respondent's interest as the developer of the 258-acre tract is largely transitory, the competing interests may extend for generations to come. Governmental regulation of the development of vacant land protects the distinct interests of the individuals who will make their homes there after the developer has wound up its affairs and assures that the often irreversible transformation of farms, woods, and wetlands will not have an unduly adverse impact on natural resources, adjacent landowners, and the community at large. See 452 U.S. at 277-280; *Hodel* v. *Indiana*, 452 U.S. 314, 325-329, 332-333 (1981).

2. In assessing the second factor—the particularized economic impact of a regulatory program—it is of course necessary to start with the fundamental premise that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922)). The court of appeals based its finding of a taking in this case principally on the diminution in the value of the land resulting from application of the zoning ordinance and subdivision regulations in effect in 1980 and the other objections to the preliminary plat stated in the Commission's June 1981 letter (Pet. App. 9a-10a). But where, as here, land-use regulations "are reasonably related to the promotion of the general welfare," this Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'" (*Penn Central*, 438 U.S. at 131). See *e.g.*, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck* v.

Los Angeles, 239 U.S. 394 (1915) (87½% diminution in value); *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. at 674 n.8.

The soundness of that rule is especially evident in this case. The passage and enforcement of the zoning ordinance and subdivision regulations did not require respondent to cease any existing use of the land in its unimproved state. Absent substantial indications to the contrary, such unimproved land (and other land as well) is generally held subject to the prospect that reasonable governmental regulation may intervene in a manner that could restrict further development of the land.[13] Accordingly, "the submission that [respondent] may establish a 'taking' simply by showing that [it has] been denied the ability to exploit a property interest that [it] heretofore had believed was available * * * is quite simply untenable." *Penn Central*, 438 U.S. at 130.[14]

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[13] The prospect that regulation may inhibit economic development of a tract is all the more evident if the land was acquired or retained for a substantial period of time while it was subject to a regulatory program that imposed special restrictions on its use or the exploitation of its resources. A finding of a taking by virtue of that very governmental regulation would be especially unwarranted in such circumstances. The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, and the wetlands and other activities of the Corps of Engineers under Section 404 of the Clean Water Act of 1977, 33 U.S.C. 1344, are examples of comprehensive federal regulatory programs that may affect a landowner's expectations regarding the extent and manner in which he may develop his land.

[14] The court of appeals' consideration of the zoning ordinance and regulations was further flawed because it focused only on 258 of the 676 acres in the Temple Hills tract. As respondent has insisted, the development of Temple Hills must be viewed as a single project. Of the original 676 acres, 250 already have been developed as a country club/golf course and additional land has been devoted to 212 lots for housing. By focusing only on that portion of the development that has not yet been sold off, the court ignored the requirement that a taking analysis must focus on the "nature and extent of interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130-131. See also *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1192-1193 (Ct. Cl. 1981) (no taking where landowner

Moreover, in this case, there was no substantial change in the relevant provisions of the zoning ordinance or subdivision regulations between 1973 and 1981 that could trigger an inquiry into the question of the diminution in the value of respondent's property even if that factor could give rise to a taking. The density and slope restrictions in effect in 1981 were essentially identical to those in effect in 1973. See pages 3-5, *supra*. The only new zoning requirement was that 10% of the acreage, attributable to roads, be deducted in calculating the total number of lots allowed; that deduction did not significantly affect the use of the land for a residential subdivision. Similarly, although subdivision regulations were revised in 1980 to increase the minimum size and road frontage for lots in cluster developments, those provisions did not affect the density permitted on the overall tract under the zoning regulations. And the cul-de-sac restrictions that the Commission applied in 1981 were actually more generous than those in effect in 1973 (C.A. App. 880, 945). Thus, the changes in the applicable regulatory provisions invoked in 1981 do not furnish even a colorable basis for a taking claim.

The court of appeals, in finding that a taking nevertheless occurred by application of the more recent regulations, relied on language in several opinions of this Court stating that application of a general zoning ordinance may effect a taking if it "denies an owner economically viable use of his land" (*Agins* v. *City of Tiburon*, 447 U.S. at 260; see also *Kirby Forest Industries* v. *United States*, No. 82-1994 (May 21, 1984); *Virginia Surface Mining*, 452 U.S. at 295-297). The court of appeals reasoned that a taking had occurred in this case because application of the ordinance and regulations in effect in 1981 and the other objections raised by the Commission would mean that respondent would not make a profit—and indeed would experience a substantial loss—

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can develop some part of the property but is prohibited from developing another portion consisting of ecologically sensitive wetlands).

if it sought to subdivide and sell the land. On this basis, the court concluded that respondent's 258 acres "had no remaining economically viable use" (Pet. App. 9a-10a (footnote omitted)). The court of appeals plainly misunderstood the meaning of the quoted phrase.

This Court in *Agins* drew the phrase "economically viable use" from a footnote in its opinion in *Penn Central* (see 447 U.S. at 260, citing 438 U.S. at 138 n.36). The latter case involved a challenge to a landmark law that imposed on the owner of Grand Central Terminal an affirmative obligation to keep the building in good repair and to refrain from altering its exterior without city approval. The footnote stressed that the Court's holding that the landmark law did not effect a taking was based on the company's "present ability to use the Terminal for its intended purposes and in a gainful fashion." Then, quoting a concession by counsel during oral argument, the Court simply observed that the company could obtain relief if it showed at some point in the future that "circumstances have so changed that the Terminal ceases to be 'economically viable'" (438 U.S. at 138 n.36).

It is one thing to suggest, as the Court did in *Penn Central*, that the government cannot, without paying just compensation, impose an affirmative and permanent obligation on an ordinary property owner to operate its premises at a loss. It is quite another to conclude, as the court of appeals did in this case, that the government has an affirmative obligation to waive the requirements of reasonable and generally applicable zoning restrictions that actually permit substantial development on the lands to which they apply (and also to waive the minimum standards for roads and the furnishing of other services) in order to enable a particular landowner to proceed with a development that otherwise would be financially unsound because of market conditions, the marginal suitability of the land, or the expense of installing the necessary improvements (cf. *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 75-78 (1980))—and that the govern-

ment must compensate the landowner if it fails to do so.[15] As this Court has said, "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979).

It therefore is clear that the Court did not intend the phrase "economically viable use" in *Agins*, *Virginia Surface Mining* and *Kirby Forest* to suggest that the government must actively promote the ability of a landowner to realize a financial return on his land. See *Park Avenue Towers Associates* v. *City of New York*, No. 84-7128 (2d Cir. Oct. 12, 1984), slip op. 6641-6645; *William C. Haas & Co.* v. *San Francisco*, 605 F.2d 1117, 1120-1121 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980). Rather, the Court was referring to circumstances in which governmental action (not the features of the land itself or the financial or other circumstances of its owner) might work a "radical curtailment of a landowner's freedom to make use of or ability to derive income from his land" (*Kirby Forest*, slip op. 12)—*i.e.*, to affirmative governmental action that drastically interferes with a recognized ability to exploit a substantial economic advantage or other potential use inhering in the property itself, and thereby effectively destroys the owner's interest in the property. Accord, *Virginia Surface Mining*, 452 U.S. at 296. See, *e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414-415 (1922); cf. *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960).[16]

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[15] It is permissible for a locality to limit development that would require the expenditure of substantial public funds for roads and other services (*City of Eastlake* v. *Forest City Enterprises*, 426 U.S. at 673; *James* v. *Valtierra*, 402 U.S. 137, 143 n.4 (1971)) or to condition approval upon the agreement of the developer to contribute to the payment, in recognition of the distinct benefit that will be realized by both the developer and the subsequent residents of the subdivision. See, *e.g.*, *Kaiser Aetna*, 444 U.S. at 179. See page 2, *supra*.

[16] See *Penn Central*, 438 U.S. at 127 (perhaps a taking occurs if a restriction "has an unduly harsh impact upon the owner's use of the property"); *Ruckelshaus* v. *Monsanto Co.*, slip op. 16, quoting

Agins, for example, involved five acres of extremely desirable residential property that allegedly had the highest market value of any land in the community (447 U.S. at 258). A total and permanent prohibition against the building of any houses on such property might well constitute a taking, at least in the absence of weighty countervailing reasons for the restriction. Compare *Miller* v. *Schoene*, 276 U.S. 272 (1928), with *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 414. In this case, however, there plainly was no such "radical curtailment" of an independent economic value.

3. Although as a general matter even a substantial adverse economic impact does not in itself render a regulatory measure a taking, the Court has acknowledged that there might be narrow circumstances in which the unique impact of a statute on a particular property interest "may so frustrate distinct investment-backed expectations as to amount to a 'taking'" (*Penn Central*, 438 U.S. at 127). In order for a taking to be found, however, the expectation must itself partake of a discrete property interest that is externally created or protected by law; "a mere unilateral expectation or an abstract need is not a property interest entitled to protection" (*Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980)).

For example, in *Ruckelshaus* v. *Monsanto Co.*, the Court relied on an "explicit governmental guarantee" in the applicable statute, the breach of which would "destroy" the manufacturer's competitive edge (slip op. 22-23). But the Court stressed that in the absence of such an "express promise," no protected expectation arose (*id.* at 20). Similarly, in *Kaiser Aetna*, the Court concluded that the linking to navigable waters of a body of water that was private property under state law had given rise to a concrete and protected expectancy in the owner that it would be able to exercise the "fundamental" right to exclude others from the private marina it had

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United States v. *General Motors Corp.*, 323 U.S. 373, 378 (1945) (a taking occurs if the action's "effects are so complete as to deprive the owner of all or most of his interest in the subject matter").

created; but the Court so held because the channel was dredged with the full knowledge and consent of the Corps of Engineers (444 U.S. at 167, 179-180).

There can be no comparable claim of a "distinct investment-backed expectation" in this case. Respondent apparently relies on the preliminary plat submitted by the original developer in 1973. But the very denomination of that filing as "preliminary" indicates that its approval by the Commission did not confer a vested right on the developer to subdivide and sell 736 lots. Indeed, under state law, a subdivision plat may be recorded only after it has received the *final* approval of the planning commission (Tenn. Code Ann. § 13-3-402 (1980)), and the Commission's regulations in this case explicitly provided that approval of the preliminary plat did not constitute acceptance of the final plat (C.A. App. 872). Moreover, the preliminary plat itself contained a notation that indicated that 267 lots were not to be developed until approved by the Commission. See page 4, *supra*.

Subsequent events further undermine the notion that respondent had a concrete expectation requiring the payment of compensation. Respondent voluntarily became the sole creditor of the developer of Temple Hills in 1977, at a time when progress was halted and the developer had failed to renew the preliminary plat in conformity with the Commission's regulations. See note 4, *supra*. And respondent purchased the remaining 258 acres at a foreclosure sale in November 1980, after the Commission had disapproved the developer's renewed preliminary plat under the 1980 regulations. See pages 5-6, *supra*. Respondent had ample notice of the relevant circumstances, and it therefore plainly had no constitutionally protected expectation that it would be entitled to develop the remainder of the Temple Hills tract in the manner depicted in the rejected preliminary plat or by application of the 1973 regulations. Compare *Ruckelshaus* v. *Monsanto Co.*, slip op. 17.[17]

[17] The jury's verdict that the Commission was estopped under ordinary common law principles of course does not control the distinct question of whether the Commission was constitutionally barred from applying the amendments to the ordinance and regulations to respondent's land without paying just compensation. Cf. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, No. 83-245 (June 18, 1984).

C. THE AWARD OF DAMAGES FOR A "TEMPORARY TAKING" SHOULD BE REVERSED

For the reasons we have explained in Point B, respondent's argument that the Commission's rejection of the preliminary plat it filed in June 1981 amounted to a "taking" of its property within the meaning of the Fifth and Fourteenth Amendments would be wholly insubstantial even if the restrictions had been *permanently* applied to respondent's land. It follows *a fortiori* that there was no "taking" of respondent's property by virtue of the *temporary* application of those provisions for the limited period between October 1980, and the date of the jury's verdict in April 1982. The judgment of the court of appeals reinstating the jury's award of $350,000 in damages for a taking of respondent's property during that period therefore should be reversed.

Accordingly, there once again[18] is no occasion for the Court to consider whether compensation must be paid for the temporary application of a regulation that is subsequently held to constitute a taking. That question is not properly presented in this case in any event. The district court held on the basis of the jury's verdict that the Commission was prevented by state law from requiring respondent to comply with its current regulations rather than those in effect in 1973 (Pet. App. 27a-28a, 29a-30a; Tr. 2016-2108, 2027). The district court then concluded that "[a]ny damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law" (Pet. App. 26a). This Court repeatedly has made clear, however, that a claim for just compensation does not lie where the governmental action that is alleged to have

[18] See *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 623 (1981); *Agins* v. *City of Tiburon*, 447 U.S. at 263.

constituted a taking was not authorized. See, *e.g.*, *Hooe* v. *United States*, 218 U.S. 322, 336 (1910); pages 16-17, *supra*. Respondent therefore has no claim to just compensation for the unauthorized actions by the Commission in 1980 and 1981, irrespective of whether those actions are regarded as having imposed permanent or temporary restrictions on respondent's use or development of its land. Respondent's claim for monetary relief in these circumstances instead is one sounding in tort, based on assertedly wrongful actions by agents of the State in their administration of a state statute. Governmental entities typically are immune from tort liability for such conduct. See *United States* v. *Varig Airlines*, slip op. 10-12; 28 U.S.C. 2680(a).

Thus, even if the Court were prepared to reach the question, this case would not be an appropriate vehicle by which to determine whether the Constitution requires that compensation be paid for the period between the date on which an authorized regulatory measure was adopted or finally applied to a particular parcel of land and the date on which a court strikes down the measure or its application on the ground that it would constitute a taking if the restrictions were given permanent effect.[19] We argued in our amicus briefs in *Agins* and *San Diego* that the Constitution does not prohibit a state from determining that, as a general matter, only prospective relief is available in those circumstances. We continue to be concerned about the consequences of an inflexible constitutional rule that would require the payment of compensation in all such cases, particularly where, as here, the application of a zoning ordinance or other regulatory measure did not require the landowner to cease any existing use of the property or prohibit him from selling it, but, at most, simply had the effect of postponing the land-

[19] The problem arises, of course, only where the governmental entity has chosen not to make compensation available and therefore not to accept and retain the property interest that the court has held would be taken.

owner's ability to devote the property to new uses.[20] Nonetheless, relief might be appropriate in particular cases involving such factors as unreasonable delay, bad faith, or interference with a distinct investment-backed expection that development could proceed *immediately*. See, *e.g.*, *Agins* v. *City of Tiburon*, 447 U.S. at 263 n.9; *Kirby Forest*, slip op. 11-14 & n.26.

We do not propose a definitive resolution of these questions here. Suffice it to say that the circumstances of this case do not suggest a compelling occasion for the announcement of a constitutional rule requiring the payment of compensation. In light of the established procedures for receipt and review of subdivision plats and the Commission's rejection of the developer's preliminary plat in October 1980, respondent could have no "distinct" or "reasonable investment-backed expectation" that it could proceed without delay during the 16-month period prior to the date on which it obtained a judicial determination that the permanent application of the regula-

[20] From the landowner's perspective, even if the permanent application of a regulatory measure would effectively destroy his interest in the property and thus constitute a taking, it would not necessarily follow that a temporary application of the measure has that effect; when the restriction is lifted, the property is restored to its market value. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 428, 435 n.12. By the same token, the development of land ordinarily is irreversible, and there accordingly is a strong countervailing public interest in maintaining the status quo pending the resolution of a legal dispute over whether the development may go forward. Temporary application of the regulatory measure therefore has essentially the same effect as a statutorily prescribed injunction pendente lite. The requirement that the landowner maintain the status quo for a reasonable period in this manner thus might be considered as "a burden borne to secure 'the advantage of living and doing business in a civilized community'" (*Andrus* v. *Allard*, 444 U.S. at 67, quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting)) and one of the "incidents of ownership" in our increasingly urbanized and complex society—and therefore not be "considered as a 'taking' in the constitutional sense." *Danforth* v. *United States*, 308 U.S. 271, 285 (1939).

tory measures in effect in 1981 would constitute a taking. And yet respondent was awarded $350,000 in damages for a temporary diminution in the value of the 258 acres, which even respondent's own expert testified ~~was~~ were worth only $1,035,000 in 1982 (Tr. 679). An award of that magnitude is a windfall; it is not one of those "burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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